7 T. R. 360 n.; *George* v. *Clagett*, 7 Id. 359; *Merrick's Estate*, 5 W. & S. 9; *Carr* v. *Hinchcliff*, 4 B. & C. 547; *Semenza* v. *Brinsley*, 18 C. B. N. S. 477; *Borries* v. *Imperial Ottoman Bank*, Law Rep., 9 C. P. 38; s. c. 43 L. J. C. P. 3.

An authority given to an agent to purchase and sell goods, and to transact business with capital furnished by the principal, and to use his name generally in the business, does not authorize the agent to form a copartnership with a third person. But if the principal knows the partnership has been formed without authority, he is bound to make known his dissent within a reasonable time: *Wright* v. *Boynton*, 37 N. H. 18; the power of an agent is limited by the authority given him. The same principal applies to partners. One binds the other so far only as he is agent of the others: *Winship* v. *Bank of United States*, 5 Pet. 560. And for the purpose of ascertaining the authority or power of one partner to bind the firm, the object of the formation of the co-partnership, and the usual course of business in the line of like partnerships must be considered: Digest of Law of Part., by Pollock, p. 31.

W. W. THORNTON.

Supreme Court of Iowa.

TIMOTHY HORAN *v.* JESSE LAZIER.

A negotiable note was payable at a bank, and on the day it fell due, the maker went to the bank, inquired for the note, and not finding it, made a special deposit of the proper amount to pay it. The bank failed before the holder presented the note, and he then brought suit against the maker. *Held*, that the deposit was a good payment and the plaintiff could not recover.

THIS was an action on a promissory note made by defendant to the order of one Braden (and duly endorsed), "payable at Allen's Bank in the city of Des Moines."

On the day the note was due, the defendant, a resident of Madison county, went to Allen's bank to pay the note. The note was not at the bank, and the defendant deposited the amount required to pay the same, and took from the bank a deposit ticket in the following form:

"B. F. ALLEN'S BANK,

To Timothy Horan, Des Moines.

March 21st 1874. Currency to pay note favor William Braden, and interest, $1512.50."

Some efforts were made by the defendant, by way of correspondence through Percival & Hatton, real estate agents at Des Moines, to have the note sent to the bank, but they were unavailing. The

money thus deposited remained in the bank, and on the 19th day of January 1875, the bank and B. F. Allen failed. It did not appear from the evidence what, if anything, would be realized on account of said deposit, but appeared to be conceded that it would be a total loss.

Cole & Cole, for appellant.

Wright, Hatch & Wright, for appellee.

The opinion of the court was delivered by

ROTHROCK, J.—We are required to determine whether the facts admitted in this case are a defence to an action on the note; or in other words, where a note is made payable at a bank, and the maker deposits the amount necessary to fully discharge it and leaves the same there, and the bank afterwards fails, is such a deposit a complete defence to an action by the payee or endorsee against the maker?

It is well settled, that as to the acceptor of bill of exchange or the maker of a promissory note, payable at a bank or other specified place, no presentment or demand need be made at the specified place, to entitle the holder to maintain an action against the maker or acceptor. Story on Promissory Notes, sect. 228; Dan. on Neg. Instr., sect. 643; 1 Parsons on Notes and Bills 308; *Wallace* v. *McConnell*, 13 Pet. 136; *Fitler* v. *Beckley*, 2 W. & S. 458; *Armistead* v. *Armistead*, 10 Leigh 525.

In Parsons on Notes and Bills, it is said: "The courts in this country have, with the exception of Louisiana and Indiana, held, that such acceptances are not conditional; that demand need not be averred by the plaintiff, but that if the acceptor was at the place at the time designated, and ready to pay the money, it was matter of defence to be pleaded on his part, which defence, however, is no bar to the action, but goes only in reduction of damages and in prevention of costs."

That the maker of a promissory note and the acceptor of a bill of exchange, payable at a particular place, are under the same obligation in this respect, and their rights and liabilities are the same, seems to be well-established. See the authorities above cited. What are the rights of the parties, however, where the maker of a note or the acceptor of a bill, deposits the money in the bank desig-

nated as the place of payment and leaves it there, is another question, upon which there is a surprising paucity of adjudicated cases. The learned counsel for the respective parties in this cause, have cited to us no case which is exactly in point. It is true, that in *Wallace* v. *McConnell*, *supra*, there is language used, from which it may fairly be implied that in such case, if the holder of the note or bill should neglect to present it at the specified place, by reason of which the money should be lost, by the failure of the bank or the like, this would be a defence; and in *Armistead* v. *Armistead*, *supra*, it is said: "that the maker, if he is ready at the time and place to make the payment, may plead the matter in bar of damages and costs; but he must at the same time bring the money into court, which the plaintiff would be entitled to receive. A further consequence, indeed, might follow, if any loss had been sustained by his failure to be present, but this must be set up as a matter of defence. In *Fitler* v. *Beckley*, *supra*, HUSTON, J., said: "I incline to the opinion in 13 Pet. 144, as above, that if the maker or acceptor, where the money is payable at a bank, pays the money into the bank to the credit of the payee on such note or bill and leaves it there, it will be a complete discharge, though the money should be lost by robbery of the bank or otherwise; but this case does not call for an opinion of the court on this point."

In *Nichols* v. *Pool*, 2 Jones L. (N. C.) 23, in discussing the question whether a demand at the place of payment is necessary to maintain an action, it is said: "The more reasonable construction that they (the words 'payable,' &c.) were used to convey the idea, that the parties had made an arrangement, suggested by considerations of convenience to both sides, according to which the money is to be paid at a particular place, on a given day; or in other words, assurance given by the debtor and accepted by the creditor, that the money will be then and there paid. * * * Considered in this sense, the effect is, that the creditor does not lose his debt by failing to apply for it at the precise time and place, but may afterwards recover it; while on the other hand, the debtor may, if in fact he had the money at the time and place, use that as a defence and defeat the creditors, by bringing the money into court; or if he deposited it and it was lost by the failure of the bank, he can put the loss on the creditor, because of his laches in not calling to get it."

In *Rhodes* v. *Gent*, 5 B. & Ad. 244, language to the same effect is

used in the opinion by one of the judges. An examination of these cases will show that the question of the rights of the parties, where there has been actual deposit made by the maker or acceptor, is not directly involved. They are all cases upon the question as to whether an action may be maintained without a demand having been made at the place of payment. The language which we have quoted is, however, germane to the question which was before the courts in the several cases involving the rights of the parties to written instruments of this character, and, if nothing more, serves to indicate the views of the learned writers of the opinions cited.

In Story on Promissory Notes, sect. 228, this language is used: "If by such omission or neglect of presentment and demand he (the maker or acceptor), has sustained any loss or injury, as if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then and in such case the acceptor or maker will be exonerated from liability to the extent of the loss or injury sustained." To the same effect see Story on Bills of Exchange, sect. 356; 1 Parsons on Cont. 272–3; 1 Daniel on Neg. Instr. sect. 643.

It is correct, as claimed by counsel for appellee, that these writers cite no authority which supports the proposition announced by them. But notwithstanding this, the views of these learned authors are entitled to proper consideration. On the other hand, no case has been cited which announces the opposite view from that given in the above citations. With the limited time at our disposal, we are unable to make an exhaustive search for authorities, and in this case we have found none which are fairly in point. In *Rowland* v. *Levy*, 14 La. Ann. 223, it was held when a note was payable at the office of a commercial firm in New Orleans, and at maturity it was presented by the holder at the place named for payment and payment refused, and a few days after maturity the maker remitted part of the same to the mercantile firm to be applied on the note, that this was no payment. It will be observed from this statement that the case is wholly different from that at bar. Here if the note had been presented at maturity it would have been paid, for the money was in the bank for that very purpose. It would, perhaps, be an unreasonable requirement to hold that the holder of the note or bill should present it again for payment. We think that, upon principle, the defendant in this case should be wholly discharged, and we will briefly state our reasons

therefor. The note was made payable at a bank. These institutions are depositories of money. They are also collection agencies, through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank, the parties expect the collection to be made through the bank. It is true when the defendant deposited the money, the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. "If the customer of a banker accept a bill, and make it payable at his bankers, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill." Byles on Bills 151. And if money be deposited for the payment of such bill or note, the holder may maintain an action against the bank therefor. Parsons on Com. Law 130. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that the payment may be made at a bank, it means that payment is to be made to the bank. The parties to this contract did not contemplate that the payee should make a journey from Indianapolis and meet the maker at Allen's bank, and there receive his money from the hands of the maker and deliver him the note. This court has three times determined that when the maker of a promissory note, payable in personal property, to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive or refuses to accept the property, the debt is thereby discharged, and the title to the property passes to the creditor: *Games* v. *Manning*, 2 Green 251; *Williams* v. *Triplett*, 3 Iowa 518; *State* v. *Shupe*, 16 Id. 36. Now, while it is held in these cases that, upon designating the property and setting it apart for the creditor, the title of the property passes, and it may be said that by the deposit of the money in the bank for the holder the right of property in the money does not pass, because the depositor may withdraw it, yet this distinction is really not an important one; for, as we have seen, if the money remains on deposit, the holder of the note may present his note and take the money, or if necessary, maintain an action for it. In one of the cases cited the note provided for payment in brick. Now, if that could be dis-

charged by delivering the brick set aside for the creditor at the time and place designated, it is difficult to see why, if the note was payable in dollars, it would not equally be a discharge to set apart and deposit the dollars for the holder of the note.

In our opinion there should have been a judgment for the defendant.

Judgment reversed.

There is some difference of opinion still prevalent in England in regard to the right of action of a payee against the maker of a promissory note, made payable at a certain time and place, as to whether presentment and demand at the place specified is necessary as a condition precedent to give the holder a right of action.

At first, in the case of *Callaghan* v. *Aylett*, 2 Camp. 549, it was held that in an action by the maker of a promissory note, payable at a certain place, it was necessary that the declaration should aver presentment and demand at the stipulated place, or it was demurrable. But in *Fenton* v. *Goundry*, 13 East 49, this was denied. The case of *Gammon* v. *Schmoll*, 5 Taunt. (C. P.) 344, follows the doctrine as laid down in *Callaghan* v. *Aylett*, *supra*; and in the subsequent case of *Sanderson* v. *Bowes et al.*, 14 East 500 (K. B.), the same doctrine was followed as far as promissory notes were concerned. Yet this latter case does not absolutely overrule the authority of the case of *Fenton* v. *Goundry*, *supra*. There is a material difference between these two cases in this; that in the latter case the bill was made payable at a certain time and place, while in the former the note was payable on demand. The doctrine does not seem to be fully settled in England yet.

There is in this country a surprising paucity of decisions on this particular point, considering the vast amount of commercial transactions of this nature. There is also in this country as in England and perhaps in this country more than in the former, a conflict of authority. The decisions of the different state courts are far from being uniform.

The doctrine generally recognised here is: that payment to the agent is payment to the principal, when the agent by his power, either express or implied, is authorized to receive payment. And even where the authority of the agent is revoked without the knowledge of the debtor, and the latter makes payment without notice of the rovocation of the authority of the agent, he will be discharged from further liability. Story on Agency, sec 430; *De Valengin's Amrs.* v. *Duffy*, 14 Peters 282.

One of the earliest cases in support of the doctrine of the principal case is *Crane* v. *Halford*, Wright 390 (1832, Ohio), where it was held that payment to a third person authorized to receive the money is payment to the principal. But it was also held, in a subsequent case, that where a person who was authorized to receive and apply the money in payment of the debt, should retain the money and request an extension of time, that it was no payment. But in the latter case the party authorized to receive the money was the agent of the payor and not of the payee. *Carrington* v. *Davis*, Wright 735 (1834, Ohio). In the earlier case of *Carley* v. *Vance*, 17 Mass. 389, it was held, where there was a promise to pay money at a certain time and place, and where the defendant was at the time and place appointed, ready with the money to discharge the debt, and in the absence of the promisee, left the money at the place for the promisee's use, that

there should have been a *profert in curia* to avail the defendant. The conclusions arrived at by the court in that case do not seem to have been called for by the facts as stated in the case; in fact the most of the opinion seems, after reading the statement of facts, to be extra-judicial. Like the principal case, there was a stipulation in the note as to the place where the note was payable, as well as the time when due; also the maker deposited the money before the maturity of the note at the place specified in the note as place of payment. It was not a question of tender that such a state of facts would give rise to. The maker promised to pay the amount of the note at maturity, at the counting-rooms of E. L.; the promisee accepted the note; and upon the delivery and acceptance of that obligation, E. L. was constituted the agent of both parties to the contract; the agent of the maker to receive the money and apply it in discharge of his debt, and of the payee to collect the money and deliver it to him, and to deliver the note or receipt to the promisor. Upon payment of the money to the agent of the holder, by the maker of the note, the maker's part of the contract was performed.

The case of *Wallace* v. *McConnell*, although not a case directly in point, is nevertheless applicable as far as presentment and demand is concerned. In that case, the note was made payable at the Bank of the United States in the city of Nashville, three years and two months after date. In May 1836, the plaintiff began suit on the note, the declaration alleging the non-payment of the note, although frequent demand had been made. There was no allegation in the declaration that a demand had ever been made at the bank. The defendant had deposited the money at the bank, and subsequent to the deposit and prior to the commencement of the suit on the note, by the holder, the money so deposited, was attached by some other creditors of the maker. It was held that presentment and demand at the place of payment was necessary to entitle the holder to maintain his action. The court was further of the opinion that if the note or bill was made payable at a place other than the bank, and no deposit could be made, or the payor should choose to retain his money, an offer at the time and place to pay the money, would discharge him from liability for interest and costs. It will be seen that this opinion is somewhat in conflict with *Curley* v. *Vance*, *supra*.

The foundation of the same doctrine contended for in the principal case was laid in Pennsylvania as early as 1820, in the case of *Peck* v. *Harriott*, 6 S. & R. 146. In that case it was held that when an agent is authorized by power of attorney to "contract for sale, sell and convey" land, and makes an agreement for the sale of such lands, and for a conveyance upon payment of the purchase-money and the performance of other conditions, payments made to him after the agreement and before conveyance will bind the principal. So payment to a person to whom it was agreed by the vendor, at the time of the sale, that the price was to be paid, made before the authority of the agent is revoked, will discharge the purchaser: *Marsh* v. *Laforest*, 1 La. Ann. 7. So, too, where the mortgagor made payment to the mortgagee's agent and inquired for the papers; search was made for the papers, but the agent said that he could not find them, when the mortgagor suggested that they might be at the recorder's office, to which the agent replied that they probably were; held, that although the mortgagees were afterwards shown to be insolvent at the time, that there was no legal presumption that the mortgagor knew that the mortgage was assigned: *Foster* v. *Beals*, 21 N. Y. 247. In a later case in New York, it has also been held that where the payee of a note leaves it with a bank for collection the bank becomes his agent

for the collection of the money, and payment at the bank discharges the maker, although the bank neglect to transfer the amount to the payee: *Smith* v. *Essex County Bank*, 22 Barb. (N. Y.) 627. This same doctrine is followed in the state of Maine: *Ingalls* v. *Fiske*, 34 Me. 232; and California, in *Rhodes* v. *Hinckley*, 6 Cal. 283; *Brumagim* v. *Tillinghast*, 18 Id. 265. In the former of these cases the obligation was made payable at a bank; the debtor deposited the amount of the debt with the bank, giving it to the clerk of the bank, who borrowed of him the money the next day after it was deposited for the payment of the debt; the amount was not entered on the books of the bank; but it was held that the debtor had lost control of the money, and that the deposit was a legal payment. The same doctrine is followed in Alabama in the later decisions: *Renard* v. *Turner*, 42 Ala. 117 (1868); *Hannah* v. *Lankford*, 43 Id. 163. This is also the law in Missouri; and it is further held in that state that payment made by mistake to an agent is payment to the principal, and discharges the debtor: *McCrary* v. *Ashbaugh*, 44 Mo. 410; *Whelan* v. *Reilly*, 61 Id. 565.

On the other hand it has been held that where notes have been placed in the hands of a justice of the peace for collection, on which suit has been commenced and they are paid before judgment, *held*, that the payment to the justice before judgment and after suit is a valid payment: *Johnson* v. *Hall*, 5 Ga. 384. There are, however, some conflicting decisions mostly of the states of Georgia and Louisiana. But the question as raised in the principal case is not fully raised in any one of them. We would simply refer to the cases of *Aquilar* v. *Bourgeois*, 12 La. Ann. 122; *Succession of O'Keefe*, 12 Id. 246; *Rowland* v. *Levy*, 14 Id. 223; *Smith* v. *Nettles*, 9 Id. 455; *Guilford* v. *Stacer*, 53 Ga. 618; *Adams* v. *Humphreys*, 54 Id. 496; *Howard* v. *Rice*, 54 Id. 52. We will not here enter into a review of these cases, as they, at the present time, are not followed outside of those states, and latterly are limited in their application, doubted, distinguished and qualified in their own states.

When a note or bill is made payable at a bank, it is usually lodged there for collection, and the promissor, if he comes when it is due and pays the money into the bank, his obligation will be cancelled and his note delivered to him. It is in the usual course of business to notify the maker of a note of the time and place of payment; but the doctrine that it is not necessary is grounded upon the principle that the debt is not discharged as to the promissor by default of presentment and demand of payment when the debt becomes due, and at the place where due. When the maker promises that he will pay on or before a certain time and at a certain place, the holder may presume that he (the maker) will have funds in that depository to meet the note when due: Story on Promissory Notes, sect. 223–229 and note 1; *United States Bank* v. *Smith*, 11 Wheat. 171; *Wolcott* v. *Van Santvoord*, 17 Johns. 248; *Caldwell* v. *Cassidy*, 8 Cowen 271; *Watkins* v. *Crouch*, 5 Leigh 522; *Covington* v. *Comstock*, 14 Pet. 43; *Barbston* v. *Gibson*, 9 How. 263; *Thompson* v. *Cook*, 2 McLean 122; *Silver* v. *Henderson*, 3 Id. 165; *Fairchild* v. *Ogdensburgh Railroad Co.*, 15 N. Y. 337.

The plain and unequivocal interpretation of a promise to pay a sum of money at a place and day certain, is that the person making the promise will, upon the day, be at the place named in the promise with the money; if he does not come, or if he does come and does not pay the money, it is not a performance of his promise. The right of the payee to receive the money does not depend on his making the demand: *Payson* v. *Whitcomb*, 15 Pick. 212, it is absolute by the very terms of the contract itself. The principle, at least, seems to be now well settled in all the states of the

American Union; and if the rule is rationally examined in all its bearings and aspects, we can come to no other conclusion than that the rulings of the court in the principal case are sound reason and good law.

C. M. DUNBAR.

Waterloo, Iowa.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF IOWA.[2]

SUPREME COURT OF KANSAS.[3]

SUPREME COURT OF MISSOURI.[4]

SUPREME COURT OF WISCONSIN.[5]

ACTION.

Privity of Contract—Damages for Breach.—The owner of property in a city, which is destroyed by fire, cannot maintain an action to recover damages for its loss, from a water company, on the ground that the loss occurred through a failure of the company to furnish water as required by the terms of its contract with the city, there being no privity of contract between the parties to such action: *Davis* v. *Clinton Water Works Co.*, 54 Iowa.

Filling up Artificial Ditch by Railway Company.—The fact that a railway company, in constructing its road-bed, has filled up an artificial ditch on the land of a third person, by which surface water was conducted from plaintiff's premises to a river, and has thus turned back the water upon said premises, is no cause of action: *O'Connor* v. *The Fond du Lac, Amboy and Peoria Railway Co.*, 54 Iowa.

AMENDMENT. See *Equity.*

ASSUMPSIT.

Services rendered to one on request of another.—Where the testimony shows that A., a physician, is called by B. to render professional services, without any specification as to whom or on whose account such services are to be rendered, and in response thereto goes to B.'s house and renders such services in medical attention to one who is the father of B. and a member of his family, all the time looking to B. alone for compensation, and after the services are rendered presents his bill therefor to B, who makes no objection thereto, but promises to pay it: *Held*,

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 13 Otto.

[2] From Hon. John S. Runnells, Reporter; to appear in 54 Iowa Reports.

[3] From A. M. F. Randolph, Esq., Reporter; to appear in 25 Kansas Reports.

[4] From Thomas K. Skinker, Esq., Reporter; to appear in 72 Mo. Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 52 Wis. Reports.